RECORD AND BRIEF

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IN THE

# Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS,

*Petitioners,*

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, AND DAVID MULLINS,

*Respondents.*

**On Writ of Certiorari to the Colorado Court of Appeals**

## BRIEF AMICUS CURIAE FOR THE CIVIL RIGHTS FORUM IN SUPPORT OF RESPONDENTS

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# BRIEF AMICUS CURIAE FOR THE CIVIL RIGHTS FORUM IN SUPPORT OF RESPONDENTS

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Civil Rights Forum ("CRF") is a voluntary membership organization established in 2002, of approximately 60 civil rights attorneys practicing throughout the state of California.[1] The members of CRF predominantly represent persons who have been victims of workplace discrimination or harassment. Previously, CRF took an active role in commenting on the California Judicial Council's draft jury instructions, and has submitted a number of amicus briefs to the California Supreme Court on a variety of related matters, including the 2008 challenge to Proposition 8, *Strauss v. Horton*, 46 Cal.4th 364 (2009).

As an organization whose members represent victims of workplace discrimination and harassment, amicus CRF is vitally interested in the outcome of this case and believes it can be of assistance in further illuminating the legal and policy issues before this Court. Indeed, many members of amicus represent private plaintiffs in litigation under the Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12900, *et seq.*, and other state civil rights statutes which, like the Colorado Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. Ann. § 24–34-301 *et seq.*, prohibit discrimination based upon a person's sexual orientation, religion, disability, race, creed, color, sex, age, national origin, or ancestry. Amicus is especially

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than the amicus curiae.

interested in the present case because CADA applies not only to public accomodations, but, like FEHA, employment. Amicus believes the experience of its members makes it uniquely positioned to offer insights not yet addressed by the parties or other amici.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk.

## STATEMENT OF THE CASE

In July 2012, after marrying in Massachusetts, Charlie Craig and David Mullins looked forward to celebrating their nuptials with excitement. Like most couples, they wanted a wedding cake for themselves and their guests to enjoy. As a result, they, along with Mr. Craig's mother, entered Masterpiece Cakeshop, a bakery in Lakewood, Colorado, where they encountered its owner, Jack C. Phillips. They asked him to create their wedding cake.

To their dismay, Mr. Phillips refused. He informed them that he would not do so, as he personally opposed same-sex marriage. He later explained to Mr. Craig's mother that his opposition was based in his religious beliefs. He now claims to have told Mssrs. Craig and Mullins that they could purchase a separate, but equally good, pre-made cake or other baked good provided it was not for their wedding.

In this case, the Colorado Court of Appeals unanimously determined that Petitioners had violated CADA, in refusing to serve Mssrs. Craig and Mullins "because of" their sexual orientation. Moreover, that court upheld CADA as constitutional and rejected Petitioners' various First Amendment free speech and religious liberty claims.

## SUMMARY OF ARGUMENT

Emphasized throughout the history of the United States has been our firm national belief that all persons should be able to participate fully and with equal dignity in the social and economic life of their communities, judged only for the content of their character and not for extraneous, immutable characteristics. *See, e.g.*, Declaration of Independence, para. 2 (U.S. 1776). Though imperfect in carrying out this principle, we have also recognized that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

The many civil rights statutes enacted at all levels of government are expressions of our commitment to the fulfillment these principles. *Cf., Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983) (observing the "myriad Acts of Congress and Executive Orders . . . attesting a firm national policy to prohibit racial discrimination in public education."). Through decades of struggle, our nation has gradually come to the realization that homosexuality and bisexuality is no moral failing, but rather an essential component of identity equal in value and dignity to heterosexuality. *See, e.g.*, J.J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives*, 30 American Psychologist 620–651 (1975), *available at* http://www.apa.org/about/policy/discrimination.aspx. In recognition of this and the substantial discrimination faced by gay men, lesbians, and bisexuals, many jurisdictions have enacted laws to protect these groups and to eradicate sexual orientation discrimination—an interest no less compelling than that in eradicating race or sex discrimi-

nation. *See, e.g., Latta v. Otter*, 771 F.3d 456, 475 (9th Cir. 2014) (noting that anti-discrimination laws that apply to lesbian, gay, and bisexual persons "serv[e] compelling state interests of the highest order").

Because civil rights laws are aimed at remedying large-scale social problems, they can only effectuate their goals if their application is as broad as possible; as a result, such laws have generally been afforded liberal interpretation by courts. Likewise, courts have been hesitant to carve out exceptions to those laws. Even where this Court has recognized that enforcement of a civil rights statute implicates the First Amendment rights of a defendant, it has generally determined that the right must yield to the "fundamental, overriding interest" of eliminating discrimination. *Bob Jones Univ.*, 461 U.S. at 604.

This has been well-demonstrated in the field of employment law, where Petitioners' arguments have already been advanced and rejected. Petitioners claim that in being required to not discriminate, the state is violating their freedom of religion and freedom of speech. Yet even "pure speech" is constitutionally subject to regulation where employment discrimination is involved. *E.g., Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D. Fla. 1991) (rejecting free speech defense to Title VII sexual harassment claim where claim was based primarily upon verbal comments and presence of sexual pictures of women). In part, this is because discriminatory acts, though they might be considered "expressive," are accorded "no constitutional protection" when they produce "special harms distinct from their communicative impact." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

Petitioners' "compelled speech" argument has likewise found no favor in the realm of employment dis-

crimination. No court has held that a requirement that an employer cease discriminatory conduct is a First Amendment violation. To the contrary, such requirements are regularly upheld against freedom of speech challenges: though employers remain free to speak in objection to anti-discrimination statutes, they must nonetheless comply with them. *Cf.*, *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 391 (1973) (holding that while newspaper could run articles or opinion columns about a civil rights statute, it could not violate it by running advertisements indicating sex discrimination).

Courts have also—with a handful of exceptions—rejected the notion that religious liberty serves as a defense to employment discrimination laws. Like the freedom of speech arguments, courts have recognized that "the state's interest in eradicating employment discrimination renders the burden upon a defendant's free exercise of religion a constitutionally permissible one." *McLeod v. Providence Christian Sch.*, 408 N.W.2d 146 (Mich. Ct. App. 1987). Though Petitioners undeniably have a right to believe and worship as they wish, this right does not grant them a "get out of jail free" card; they must follow neutral laws of general applicability, like CADA, just as everyone else must.

Should Petitioners' position prevail despite the clear judicial consensus against it, the result would be devastating to the enforcement of employment discrimination laws. As an initial matter, the exemption Petitioners seek is not, and can never be, narrow. It would seep into other areas of civil rights law, imposing upon courts a deluge of cases demanding a determination of whether their product, service, or employment situation is sufficiently "custom."

For these reasons, and those elucidated below, Petitioners' arguments in the present case should be rejected, just as they have been in the the context of employment discrimination. Any other outcome will frustrate the purpose of employment discrimination laws by disrupting settled law and expanding defenses and exceptions to those laws.

## ARGUMENT

### I. CIVIL RIGHTS STATUTES MUST BE APPLIED BROADLY TO EFFECTUATE THEIR PURPOSES.

#### A. Civil Rights Statutes Exist to Effectuate the Compelling Government Interest in Eradicating Discrimination

In the United States, civil rights statutes were established primarily as a means of preventing and eliminating discrimination in civic, economic, and social relations, on a broad scale. *See, e.g.*, *Williams v. Dep't of Pub. Safety*, 369 P.3d 760, 779 (Colo. App. 2015) ("[I]ndividual remedies are 'merely secondary and incidental' to CADA's primary purpose of eradicating discriminatory practices."); *see also In re EEOC*, 709 F.2d 392, 395–96 (5th Cir. 1983) (explaining that Title VII was enacted because "[i]n the eyes of Congress, discrimination was, and continues to be 'an urgent and most serious national problem.").

This interest in eliminating discrimination arises from a recognition of the importance of ensuring the inclusion of marginalized groups as full members of society. *See, e.g.*, *Taxman v. Bd. Of Educ. Of Tp. Of Piscataway*, 91 F.3d 1547, 1557 (3d Cir. 1996) (recognizing that a major purpose of Title VII is to assist those who have "been excluded from the American dream for so long."); *see also* Cal. Gov't Code § 12920 ("[T]he practice of denying employment opportunity

and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general."). In other words, discrimination not only inflicts injury upon the individual, but causes social harm as well. *See Roberts*, 468 U.S. at 625 (noting that sex discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."); *see also* Paul Brest, *The Supreme Court 1975 Term Forward: in Defense of the Anti-discrimination Principle*, 90 Harv. L. Rev. 1, 8 (1976) ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.").

As a result, the government interest in eliminating discrimination has been universally found to be "fundamental," "compelling," and "overriding." *See, e.g., Bob Jones Univ.*, 461 U.S. at 604; *Commodore Home Sys., Inc. v. Superior Court*, 32 Cal.3d 211, 220 (1982) ("[T]he policy that promotes the right to seek and hold employment free of prejudice is fundamental."); *see also In re EEOC*, 709 F.2d at 395–96 (describing discrimination as an "urgent and most serious" problem).

### B. The Compelling Government Interest in Eradicating Discrimination Extends to Sexual Orientation Discrimination

The government interest in eradicating discrimination has been universally found to be compelling, even

"overriding." *Bob Jones Univ.*, 461 U.S. at 604. This principle applies with no less force to sexual orientation discrimination.

First, courts have found that the government interest in eliminating discrimination is compelling, without distinction between the groups protected. *EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms"), *cert. denied*, 453 U.S. 912 (1981); *Russell v. Belmont Coll.*, 554 F.Supp. 667, 677 (M.D. Tn. 1982) ("[T]his nation has a strong public policy against discrimination not only on the basis of sex but in all forms."). Accordingly, as a prohibited form of discrimination, the interest in eliminating sexual orientation discrimination is no less compelling.

Second, eliminating sex discrimination has repeatedly been found to be a compelling government interest. *E.g.*, *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 502 F.3d 136 (2d Cir. 2007) ("[The state's] interests in applying its non-discrimination policy are substantial. As the district court acknowledged, '[t]here is undoubtedly a compelling interest in eradicating discrimination based on gender."). Because discrimination on the basis of sexual orientation is inherently "because of" sex, its elimination constitutes a compelling government interest.

In *Price Waterhouse*, this Court found that sex discrimination prohibited under Title VII of the Civil

Rights Act of 1964 encompassed "sex stereotyping," such as discriminating against employees because they do not "match[ ] the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). As the Equal Employment Opportunity Commission has repeatedly argued, "[d]iscriminating against a person because of the sex of that person's romantic partner necessarily involves stereotypes about 'proper' roles in sexual relationships—that men are and should only be sexually attracted to women, not men." *EEOC v. Scott Med. Health Ctr.*, 217 F.Supp.3d 834, 841 (W.D. Pa. 2016) (quoting and endorsing argument from EEOC brief).

The Seventh Circuit reached the same conclusion, albeit under slightly different reasoning, in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). There, it considered a claim by a lesbian employee that she had been discriminated against in violation of Title VII. In concluding that sexual orientation discrimination is a form of sex discrimination under Title VII, the court reasoned that if the employee had been a man attracted to women, she would not have faced adverse treatment; however, because she is a woman attracted to woman, she did face such treatment. *Id.* at 346. Because the sole factor dictating the difference in treatment was the plaintiff's sex, the court concluded that this constituted sex discrimination.

Finally, innumerable statutes, executive orders, court decisions, and local ordinances make clear a firm policy of prohibiting discrimination because of sexual orientation. Presidential executive orders remain in effect prohibiting discrimination against gay men, lesbians, and bisexuals in the federal workforce and among federal contractors. E.O. 13672 of Jul 21, 2014. Likewise, Congress has enacted several

statutes specifically to protect gay, lesbian, and bisexual persons. *See, e.g.*, 18 U.S.C. § 249 (expanding federal hate crimes statute, and extending protections to lesbian, gay, bisexual, and transgender persons); Pub. L. No. 113–4, 127 Stat. 54 (March 7, 2013) (extending the federal Violence Against Women Act to include protections for lesbian, gay, bisexual, and transgender persons).

Many states, and 225 cities and counties, have also enacted statutes to protect gay, lesbian, and bisexual persons from discrimination in public accommodations, employment, education, and many other areas. *State Public Accommodations Laws*, National Conference of State Legislatures, *at* http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (July 13, 2016); *State Employment-Related Discrimination Statutes*, National Conference of State Legislatures, *at* http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf (July 2015); *Safe School Laws: Anti-bullying*, Movement Advancement Project, *at* http://www.lgbtmap.org/img/maps/citations-schools-bullying.pdf (September 22, 2016); *Local Non-Discrimination Ordinances*, Movement Advancement Project, *at* http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances (October 2, 2017).

The protection of gay men, lesbians, and bisexuals by these laws has been recognized as a compelling interest by numerous state courts. *See, e.g.*, *Barrett v. Fontbonne Acad.*, 33 Mass.L.Rptr. 287 (2015) ("Recognizing the Commonwealth's compelling interest [in eliminating sexual orientation discrimination] in no way suggests that Fontbonne agrees with the Commonwealth's anti-discrimination policy, as long as it complies with the law imposed by the civil authorities upon employers generally, even under protest."); *N.*

*Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158–59 (2008) (finding that an anti-discrimination statute prohibiting sexual orientation discrimination, including by medical providers, "furthers California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal"); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) ("The eradication of sexual orientation discrimination is a compelling governmental interest.").

In addition, this Court has repeatedly found unconstitutional governmental efforts to target gay men, lesbians, and bisexuals for disfavored treatment. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."); *United States v. Windsor*, 133 S.Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute."); *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) ("The Texas statute [prohibiting same-sex intercourse] makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[T]he amendment [preventing protection of gay men, lesbians, and bisexuals by anti-discrimination statutes] seems inexplicable by anything but animus toward the class it affects.").

### C. Civil Rights Statutes Cannot Operate Effectively if Courts Impose Myriad Exceptions

As courts have repeatedly noted, it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Civil rights statutes are precisely such laws. *See, e.g., Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) (applying *Tcherepnin* in interpreting the ADA); *see also Riad v. 520 South Michigan Ave. Assocs. Ltd.*, 78 F.Supp.2d 748, 754 (N.D. Ill. 1999) (applying *Tcherepnin* in a Section 1981 context). The more exceptions courts impose upon such remedial and popular statutes, the more difficult it is for them to operate.

This is equally true when defendants frame objections as First Amendment issues. In *EEOC v. Mississippi College*, 626 F.2d at 477, for example, a woman brought suit under Title VII against a college owned and operated by a religious organization, alleging sex discrimination. *Id.* at 478. In response, the college argued that the First Amendment precluded liability. The Fifth Circuit rejected the college's position because, among other reasons, granting an exemption would "seriously undermine the means chosen by Congress to combat discrimination." *EEOC v. Miss. Coll.*, 453 U.S. at 489.

Likewise, this Court has previously found that where statutory schemes require such generality to effectuate their purposes, the Constitution does not require even religious exemptions. *See United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, this Court addressed a religious objection by an Amish employer to participation in the Social Security program. Noting that "it would be difficult to accommodate the compre-

hensive social security system with myriad exceptions flowing from a wide variety of religious beliefs," the Court ruled against the employer. *Id.* at 259–260.

Like the Social Security system, civil rights statutes are "comprehensive," working with one another to effectuate their common purpose of eradicating discrimination. "[P]ublic accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined." *State v. Arlene's Flowers, Inc.*, 187 Wash.2d 804, 851–52 (2017). Like the exemptions sought, and rejected, in *Lee* and more recently in *Arlene's Flowers*, the exemption sought here should therefore be rejected.

## II. THE SPECIAL RIGHTS SOUGHT BY PETITIONERS HAVE BEEN PREVIOUSLY REJECTED IN THE EMPLOYMENT CONTEXT.

Of particular concern to Amicus is the impact that a decision in favor of Petitioners would have on employment law, making the prosecution of civil rights cases against employers even more difficult than it is now. At present, the use of the First Amendment, framed either as freedom of speech or freedom of religion, as a defense to the enforcement of any civil rights statute has been rarely accepted by the courts. Yet Petitioners urge this Court to unsettle previously settled law, and to depart from this uniformity. As civil rights attorneys, members of Amicus note that such an exception will inevitably bleed over into employment law, and pose a threat to the proper enforcement of employment discrimination statutes.

### A. There is No Constitutional Right to Discriminate

As an initial matter, there is a clear judicial consensus that there is no constitutional right to discriminate, even where that "right" is framed as freedom of speech or freedom of association. For example, when a law firm raised these First Amendment arguments as defenses against Title VII in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court roundly rejected them. In rejecting that argument, the *Hishon* court imported its holding in another context that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 78 (*quoting Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

After remand from this Court, the United States Court of Appeals for the District of Columbia Circuit reprised, and likewise rejected, the First Amendment argument in *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990). As this Court will recall, Hopkins was denied partnership because she was considered too masculine. Hopkins sued alleging sex discrimination. Among other defenses, Price Waterhouse contended that "a court order forcing it to accept Ann Hopkins as a partner would violate its partners' constitutional rights to free association." *Id.* at 980. As this Court did in *Hishon*, the Circuit brushed aside the constitutional argument, noting only that Price Waterhouse's First Amendment right must "yield to the compelling national interest in eradicating discrimination." *Id.* at 980.

Here, Petitioners assert the same right to discriminate claimed by King & Spaulding and Price Waterhouse: having violated an anti-discrimination statute

passed to effectuate the government's compelling—even overriding—interest in eradicating discrimination, they assert that compliance with the law amounts to a violation of their rights under the First Amendment. This argument is no more convincing now in justifying discrimination against gay men, lesbians, and bisexuals than it was in the 1980s in justifying discrimination against women.

That Petitioners claim to engage in "custom" work or creative expression does not distinguish this case from that of *Hopkins* or *Hishon*. *Hishon* involved a suit against a law firm for failure to make a woman partner because of her gender. *Hishon*, 467 U.S. at 78. Like Petitioners' conception of baking a cake, "[l]egal work unquestionably involves creative and expressive skill and effort," *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *see also Jacoby & Meyers v. Supreme Court of New York*, 852 F.3d 178, 185 (2d Cir. 2017) (noting that lawyers have "expressive rights in the causes they pursue" when those cases "implicate expressive values"). Despite the creative and expressive nature of legal work, however—and the role that partners play in shaping that work—this and other courts have found, rightly, that the compelling interest in eliminating discrimination takes precedence. *See Hishon*, 467 U.S. at 78.

Likewise, elevating an employee to partnership necessarily involves carving out a "custom" function, under which the employee gains a say in the operation of the enterprise and significant autonomy over the work they do and how they do it. Again, despite the "custom" nature of partnership and the right to association, the D.C. Circuit did not make the differentiation that Petitioners make here, instead finding against the defendants. *Hopkins*, 920 F.2d at 980.

This precedent makes clear the outcome of the present case: "There is no constitutional right . . . to discriminate" in the selection of customers, *cf. Hishon*, 467 U.S. at 78, and to the extent CADA implicates Petitioners' First Amendment rights, which Amicus does not believe it does, those must "yield to the compelling national interest in eradicating discrimination." *Hopkins*, 920 F.2d at 980. Any other holding will erode the foundation of civil rights law.

### B. Even "Pure Speech" is Subject to Regulation by Anti-Discrimination Laws

It is well-settled that even "pure speech" can give rise to Title VII liability without running afoul of the First Amendment. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *see also Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal.4th 121, 136 (1999) ("It is not surprising that defendants concede that the First Amendment permits the imposition of civil liability for pure speech that violates the FEHA, because the [Supreme Court's] opinions . . . leave little room for doubt on this score."). Indeed, '[m]any crimes can consist solely of spoken words, such as soliciting a bribe. . . perjury. . . or making a terrorist threat." *Aguilar*, 21 Cal.4th at 134.

As a result, this Court and others have repeatedly upheld civil rights statutes and injunctions against First Amendment claims. In *Pittsburgh Press Co.*, 413 U.S. 376, this Court addressed the use of an injunction against a newspaper to prevent publication of employment advertisements in violation of an anti-discrimination statute. *Id.* at 376. Dismissing the newspaper's defense that such an injunction would constitute prior restraint, the *Pittsburgh* court explained that "[a]ny First Amendment interest . . . is altogether absent when the commercial activity itself

is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

Here, like the newspaper in *Pittsburgh*, Petitioners are engaged in a commercial enterprise. Like the statute at issue in *Pittsburgh*, CADA is an otherwise-valid limitation on economic activity, and its restriction on speech is incidental to that regulation. Moreover, Petitioners here did not merely advertise potential future discrimination, they engaged in it despite its prohibition by CADA. Under *Pittsburgh*, Petitioners' First Amendment interest in engaging in this discrimination—even if it were "pure speech," which it is not—is "altogether absent" because the commercial activity itself, discrimination because of sexual orientation, is illegal and the "restriction" against the "speech" in question is "incidental to a valid limitation on economic activity." *Id.* at 389.

**i. Discrimination Statutes are Content- and Viewpoint-Neutral**

Petitioners also suggest that the Commission's enforcement of CADA is not viewpoint- or content-neutral. Pet. Br. at 28. Yet civil rights statutes, and their enforcement actions, have near-universally been found content-neutral. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), this Court upheld the validity of hate crimes legislation against a First Amendment challenge. In explaining its holding, it noted that "Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) [is] an example of a permissible content-neutral regulation of conduct." *Wisconsin v. Mitchell*, at 486. This language has been cited by numerous lower courts in upholding employment discrimination statutes against First Amendment challenges. *See,*

*e.g.*, *Baty v. Willamette Indus., Inc.*, 985 F.Supp. 987, 995 (D. Kan. 1997), *aff'd* 172 F.3d 1232 (10th Cir. 1999).

Moreover, even under Petitioners' theory, their argument must fail. Similar claims have been raised against Title VII's prohibition on sexual harassment in the workplace. *See, e.g.*, Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 8 (1994) (explaining the argument that "[u]nder the hostile environment theory, Title VII bans speech and expressive conduct based on its offensive content"); *see also* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding a Collision*, 37 VILL. L. REV. 757 (1992). According to this view of Title VII, the entire theory of sexual harassment violates the First Amendment because it prohibits conveying a "hostility message" (i.e., "terms of derision," like "bitch") or a "sexuality message," (i.e., "terms of endearment," such as "honey" or "sweetie"), and accordingly is not content neutral. Fallon, *supra* at 8–9.

These arguments are flatly contrary to existing law, as even some advocates of the anti-Title VII position have acknowledged. *See* Fallon, *supra* at 9 (conceding that "it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech."). As a result, such arguments, when raised, have been roundly rejected by courts. In *Robinson*, 760 F.Supp. at 1486, a female employee brought an action for sexual harassment under Title VII, alleging a hostile workplace created by male workers posting nude and semi-nude pictures of women in the workplace and making sexually demeaning remarks and "jokes." *Id.* at 1523. The defen-

dants argued that the pictures and harassment were speech protected by the First Amendment; as a result, defendants claimed, they could not be punished under Title VII because doing so would not be content or viewpoint neutral. The court rejected this argument, holding that "the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place and manner regulation of speech." *Id.* at 1535. It also found that:

> [T]he pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment . . . . In this respect, the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish.

*Id.* at 1535 (citations omitted). As a result, all that is required to pass constitutional muster is "a legitimate government interest unrelated to the suppression of speech, content neutrality, and a tailoring of the means to accomplish this interest." *Id.* Because eliminating discrimination is a compelling government interest, and because "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection," *Roberts*, 468 U.S. at 628, prohibiting discriminatory workplace speech did not present any constitutional problems. *Robinson*, 760 F. Supp. at 1535. The same reasoning has been adopted by other courts. *See, e.g., Baty v. Willamette Indus., Inc.*, 172 F.3d 1232 (10th Cir. 1999) (endorsing district court's reliance on *Robinson* in rejecting First Amendment defense to harassment claim), *overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Booth v. Pasco Cnty.*,

829 F.Supp.2d 1180, 1202 (M.D.Fl. 2011) (rejecting union's argument that a memorandum it circulated accusing plaintiffs of filing "frivolous" charges was not retaliation because it constituted speech protected by the First and Fourteenth Amendments); *Watkins v. United States*, No. 14–60354-CIV, 2014 WL 11380940, at *2 (S.D. Fla. July 25, 2014), *aff'd sub nom. Watkins v. U.S. Postal Emp.*, 611 F. App'x 549 (11th Cir. 2015) (rejecting argument that First Amendment precluded liability under anti-discrimination law for singing of an anti-gay song in workplace).

An analogous situation presents itself here. Petitioners have engaged in discriminatory conduct—denying the opportunity to purchase a commodity because of the sexual orientation of Mssrs. Craig and Mullins—which they now frame as speech protected by the First Amendment. To shore up this claim, Petitioners insist that CADA is not "content" or "viewpoint" neutral because "Phillips triggered CADA because he addressed the topic of marriage through his art." Pet. Br. 35.

However, under the *Robinson* analysis used by many courts, CADA's enforcement here should present no constitutional problems. Like the regulation of discriminatory workplace conduct, public accommodations laws regulate the "time, place and manner" of certain kinds of arguably expressive conduct. In addition, denial of service—like the creation of a hostile workplace—constitutes discriminatory conduct rather than protected speech. CADA's enforcement here therefore easily passes muster: it is done in furtherance of the compelling government interest of eradicating sexual orientation discrimination; it is content neutral; and it is narrowly tailored to the means of accomplishing that interest.

Moreover, the case law developed under Title VII makes clear that Phillips' conduct in denying service to Mssrs. Craig and Mullins is entitled to "no constitutional protection" because, though "potentially expressive", it "produce[s] special harms distinct from [its] communicative impact": the exclusion and social stigmatization of same-sex couples that arises from such denials of service. It is precisely that exclusion and social stigmatization that many civil rights statutes were promulgated to prevent.

### ii. Prohibiting Continued Discrimination is not Compelled Speech

To the extent Petitioners attempt to differentiate this case on the grounds of "compelled speech," their argument is no more persuasive. Petitioners effectively contend that providing equal service to same-sex couples is speech, and that requiring them to engage in that "speech" is a violation of the First Amendment. This is merely another formulation of the argument made in *Robinson*: that a requirement that defendants cease their discriminatory conduct, here by serving customers, is in effect a kind of speech itself. As courts have repeatedly held, requiring defendants to cease their unlawful, discriminatory conduct presents no First Amendment problems. *See, e.g., Aguilar*, 21 Cal.4th at 136.

*Pittsburgh Press Co.*, discussed above, is again instructive. There, this Court upheld the constitutionality of an injunction preventing a newspaper from running a discriminatory advertisement in violation of anti-discrimination laws. 413 U.S. at 390–91. The Court recognized that the injunction forcibly altered the expression of the newspaper. *Id.* at 384. However, it distinguished between the newspaper's ability to "publish and distribute advertisements" *about* the anti-discrimination law, *id.* at 391, from running ad-

vertisements which indicate that employers will engage in sex discrimination. *Id.* at 388–89. The former constitutes protected speech. As for the latter, "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

This distinction mirrors that made by the Colorado Court of Appeals in its decision. Under this enforcement action, precisely like the newspaper in *Pittsburgh Press Co.*, Petitioners are required to desist from discriminating, this time in provision of service and against lesbians, gay men, and bisexuals. However—like the newspaper in *Pittsburgh Press Co.*—Petitioners remain free to speak in opposition to CADA or marriage equality. As the court below noted, Petitioners can "disassociate [themselves] from [their] customers' viewpoints . . . . CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015). All that is required is that they not discriminate in their provision of services.

Petitioners further object to the remedies imposed by the Commission, namely injunctions requiring Petitioners to cease discriminating and to train staff on compliance with CADA. This argument has also been rejected in the world of employment discrimination law. For example, in *Aguilar*, 21 Cal.4th at 121, the California Supreme Court addressed whether an injunction imposed pursuant to a hostile workplace en-

vironment lawsuit was an unconstitutional prior restraint of speech. The court concluded it was not, reasoning that "[a] statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." *Id.* at 134. On this point, this case is the same, here involving CADA's otherwise valid restriction on discrimination, which can, arguably, be "violated by the use of . . . expressive activity." *Id.* Even if Petitioners are right that baking is an expressive activity, CADA's enforcement under these circumstances is routine and should accordingly be upheld.

### C. Religious Liberty Rarely Serves as a Defense to Anti-Discrimination Statutes

It is also well-established that the First Amendment's guarantee of freedom of religion does not generally provide a defense against employment discrimination laws. *Cf. Emp.'t Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[T]o say that a nondiscriminatory religious-practice exemption is permitted . . . is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (assuming for the sake of argument "that the pre-1972 [Title VII religious exemption allowing religious organization to engage only in religious discrimination, but prohibiting other kinds] was adequate in the sense that the Free Exercise Clause required no more").[2]

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[2] Amicus here distinguishes between the requirements of the First Amendment and the requirements of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, and its state analogs, which are not implicated in the present case.

Even in cases involving religious organizations—which Petitioners are not—the religious freedom defense has rarely prevailed. *E.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366–68 (9th Cir. 1986) (rejecting First Amendment defense raised by religious school against enforcement of Title VII in sex discrimination case); *Vigars v. Valley Christian Ctr. Of Dublin, California*, 805 F.Supp. 802 (N.D.Cal. 1992) (finding no bar to Title VII liability where Christian school terminated librarian for out-of-wedlock pregnancy). For example, in *EEOC v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), *abrogated on other grounds as recognized by American Friends Service Committee Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991), the Ninth Circuit found that, though enforcing an antidiscrimination statute prohibiting sex discrimination and retaliation against a church-affiliated publisher would impinge upon the publisher's free exercise of religion, the government's compelling interest in eradicating discrimination justified the burden.

State courts have also rejected religious freedom arguments in the employment context. In *McLeod*, 408 N.W.2d 146, a woman teacher at a Christian school was terminated pursuant to the school's faith-based policy of foreclosing employment to women with school-aged children. She brought suit alleging sex discrimination in violation of the state employment discrimination statute. In response, the school asserted that applying the state anti-discrimination statute would violate its religious freedom. The court rejected this argument, explaining that "the state's interest in eradicating employment discrimination renders the burden upon a defendant's free exercise of religion a constitutionally permissible one." *Id.* at 152.

Religious liberty defenses have had even less success in the context of non-church employers, like Petitioners. In *Venters v. City of Delphi*, 123 F.3d 956 (2d Cir. 1997), a former public employee, Venters, filed suit against her employer for improper discharge in violation of the First Amendment and of Title VII. Venters' supervisor, Ives, was a born-again Christian who, in the workplace, "constinuously interjected religious observations and quotations from the Bible" and made clear to Venters that he considered her to be an immoral person. *Id.* at 962–63. He also, unsolicited, provided Venters with a copy of the Bible and other religious materials, and made numerous comments indicating his disapproval of Venters' lifestyle, which sometimes included her socializing with married men at her home. *Id.* at 963.

In finding no bar to Title VII liability, the court observed "there may be some tension between the rights that Venters enjoys under . . . Title VII and Ives' own First Amendment rights." *Id.* at 977. Nonetheless, it concluded:

> Whatever the First Amendment may have entitled Ives to believe, to say, or to do, it did not permit him as a public official to require his subordinate to conform her conduct and her life to his notion of 'God's rule book.' . . . It did not allow him to condition her continued employment on the state of her 'salvation.' . . . It did not grant him license to make highly personal remarks about the status of her soul when informed that these remarks were unwelcome.

*Id.* Like Ives, Petitioners, in a place of business, engaged in prohibited discrimination. Though Ives subjected Venters to a hostile workplace environment and Petitioners discriminated in public accommodations, both violated relevant civil rights statutes and

claimed do to so for religious reasons. Like Ives, Petitioners contend they are being silenced; yet, both are free to believe, to speak, and to act freely in accordance with their beliefs—provided they do not do so in violation of the rights of others. The First Amendment does not serve as a talisman that empowers its wielder to transgress civil rights laws provided he utters the right words and claims religious, rather than secular, motivation.

Petitioners argue that the present case is different. In their view, the way CADA has been enforced renders it not a "neutral rule of general applicability" because "[t]he Commission has applied CADA to target Phillips's religious beliefs for adverse treatment." Pet. Br. 39. As a result, Petitioners suggest, the application of CADA here must be subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

However, Amicus has uncovered no instance in which either a civil rights statute or an enforcement of such a statute has been found to be not neutral or generally applicable. To the contrary, courts have generally found that statutes like CADA pose no neutrality problems. *See, e.g.*, *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000) ("[T]he First Amendment does not stay the application of a generally applicable law such as Title VII to the religious employer unless Congress so provides."); *Telescope Media Grp.*, No. CV 16–4094 (JRT/LIB) 2017 WL 4179899, at *21 (D. Minn. Sept. 20, 2017) (finding Minnesota human rights law to be a "neutral law of general applicability"); *Lukaszewski v. Nazareth Hosp.*, 764 F.Supp. 57 (E.D.Pa. 1991) ("[N]eutral statutes of general applicability do not violate the Free Exercise Clause unless directed specifically at religious practices . . . . The ADEA is a neu-

tral law of general applicability to any employer with greater than twenty employees. It does not target or discriminate against religious organizations in any way.").

The First Amendment exists to ensure liberty in the exercise of one's own faith; it provides no right to violate the rights of others simply because the violation is supposedly motivated by faith. Indeed, "[n]o real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their . . . acts." *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 779 (Okla. 1989) (rejecting church's First Amendment defense to tort claims).

## III. PETITIONERS' POSITION WOULD INEVITABLY UNDERMINE EMPLOYMENT DISCRIMINATION LAWS.

The facts of this case are simple and similar to so many other civil rights cases. Mssrs. Craig and Mullins sought to purchase a cake for their wedding reception from Petitioners. Petitioners denied them the ability to do so solely on the basis of their sexual orientation and with no knowledge of what specific message the cake might convey. Petitioners suggest that the present case is unique as it involves an "artist" "design[ing] custom expression that conveys ideas they deem objectionable." Pet. Br. 15. In doing so, Petitioners effectively assert that *any* "custom made" item is expressive speech and that, as a result, *any* civil rights law that applies to such items or conduct is an infringement upon the right to be free from compelled speech. *See* Pet. Br. 21 ("[A]ny wedding cake [Petitioners] would design for [Mssrs. Craig and

Mullins] would express messages about their union that [Petitioners] could not in good conscience communicate.").

The exemption sought by Petitioners is not narrow and will not be confined to public accommodations statutes. All areas of civil rights law are intertwined. Doctrinal changes to civil rights law invariably produce spillover effects, as nearly every civil rights doctrine borrows from another. *See, e.g., Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) (noting that courts have interpreted Title IX by looking to the body of law developed under Titles VI and VII). Likewise, in interpreting state civil rights laws many state courts borrow from federal case law. *See, e.g., Lyle v. Warner Bros. Television Prods.*, 38 Cal.4th 264, 278 (2006) ("California courts frequently seek guidance from Title VII decisions when interpreting the FEHA and its prohibitions against sexual harassment.").

This holds in the employment discrimination context, where courts have frequently invoked case law developed under other types of civil rights statutes. In *Hishon*, where a defendant raised a First Amendment defense against the enforcement of Title VII, this Court rejected that argument in part by noting that "[t]here is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union." *Hishon*, 467 U.S. at 78. (citing *Runyon v. McCrary*, 427 U.S. 160 (1976); *Ry. Mail Assn. v. Corsi*, 326 U.S. 88, 93–94 (1945)). Accordingly, the determination that there is a constitutional right to discriminate in public accommodations cannot, and would not, be limited to public accommodations.

Moreover, Petitioners' proposed "limiting principle"—that only purveyors of "custom" items are exempt from civil rights laws—is illusory. Requiring courts to determine what items are "custom," or what workplaces are analogous to "custom" items, will frustrate attempts to enforce civil rights statutes. This is particularly so because no such exception has been previously recognized, despite myriad First Amendment challenges to nearly every civil rights statute in existence. *See, e.g.*, *Elane Photography, LLC,* 309 P.3d at 71 (noting that no precedent exists under New Mexico or federal law recognizing a distinction between "custom" and "non-custom" work).

The Supreme Court of New Mexico recognized the sweeping breadth of any exemption for "custom" items in rejecting an argument similar to that advanced by Petitioners:

> The wedding industry in particular employs a variety of professionals who offer their services to the public and whose work involves significant skills and creativity. For example, a flower shop is not intuitively "expressive," but florists use artistic skills and training to design and construct floral displays. Bakeries also offer services for hire, and wedding cakes are famously intricate and artistic. Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.

*Elane Photography, LLC,* 309 P.3d at 71. Under Petitioners' argument, then, nearly every service or good required for the celebration of a wedding can be legally denied to same-sex couples. Such an outcome would render meaningless this Court's determination that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy

to make such profound choices." *Obergefell*, 135 S.Ct. at 2599. Perhaps recognizing this, numerous courts have declined to extend special rights to companies providing "custom" or wedding services. *See, e.g., Telescope Media Group v. Lindsey*, 2017 WL 4179899, at *13 (D. Minn., Sept. 20, 2017, No. CV 16–4094 (JRT/LIB)) (wedding videographer); *State v. Arlene's Flowers, Inc.*, No 13–2-00871–5 (Superior Court of Washington, filed Feb. 18, 2015) (wedding flowers); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016) (wedding venue).

This will inevitably affect employment discrimination law. Employers will insist upon First Amendment exemptions as well, forcing courts to address the question: what jobs are "custom" or "expressive"? This is no hypothetical, as such defenses have been raised before. The idea that hiring decisions, and in particular partnership decisions, are expressive was pioneered in defense of sexism in the 1980s; it failed then. *E.g., Hishon*, 467 U.S. at 78; *Hopkins*, 920 F.2d at 980. In a world where Petitioners' position governs, however, there is no guarantee that the same outcome would obtain the next time those defenses are articulated.

Given the breadth of what Petitioners ask, it is clear their proposed carve-out is one that would "seriously undermine" the means chosen by innumerable law-making bodies to combat discrimination. *Cf. EEOC v. Miss. Coll.*, 626 F.2d at 489. It must be rejected.

## CONCLUSION

Like so many of the clients Amicus' members represent, Mssrs. Craig and Mullins were treated worse than their peers because of who they are. No discourse on the motivations for that discrimination can

mitigate the harm done. Such violations of civil rights have the effect of denigrating their victims and sending the message that the group to which the victims belong are not full and equal members of society. That the discriminator claims they have acted so because of God's will makes the wrongdoing no less palpable, the message of inferiority no less clear, and the social harm no less real. *See Roberts,* 468 U.S. at 625 (noting that sex discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."); *see also* Brest, *supra* at 8 ("Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries."). It is precisely these harms, regardless of secular or religious motivation, that our civil rights statutes—whether federal statute, state law, or local ordinance—were enacted to prevent. Granting what Petitioners ask here will frustrate those purposes, giving this Court's imprimatur to "legitimate" discrimination.

Finally, this and other courts have previously addressed and rejected the arguments now raised by Petitioners. A finding in favor of Petitioners would not only be contrary to existing law, but inevitably impact other areas of civil rights law, perversely allowing defendants to invoke constitutional principles designed to vindicate individual dignity in support of discrimination.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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